Court of Appeals No. 48786-1-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

OLIVIA HERRING and WILLIAM HERRING, husband and wife,
Plaintiffs/Respondents,

v.

JOSE PELAYO and BLANCA PELAYO,
Defendants/Appellants.

APPELLANTS' REPLY BRIEF

By:

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A. The trial court's findings do not support its conclusion that all the requirements of timber trespass have been met.

Plaintiffs argue a finding of willfulness is not required.[1] Plaintiffs fail to address *Gardner v. Lovergren*, 27 Wash. 356, 362, 67 P. 615 (1902) ("*...Being, then, of a penal nature, it must be construed as other penal statutes are construed; viz.,* ***the intent to commit the trespass must appear***. Emphasis added."). Plaintiffs also fail to address *Blake v. Grant*, 65 Wn. 2d 410, 412, 397 P. 2d 843 (1964) ("*The rule is well established in Washington that* ***there must be an 'element of willfulness' on the part of the trespasser to support treble damages***. (Citations omitted; emphasis added.)"). Plaintiffs also fail to address *Birchler v. Castello Land Co.*, 133 Wn. 2d 106, 110, 942 P. 2d 968 (1997) ("*As befits a penal statute, our decisions have interpreted this punitive damages provision narrowly.*"). The trial court's failure to enter a finding of willfulness cannot be reconciled with either *Gardner v. Lovergren*, *Blake v. Grant*, or *Birchler v. Castello Land Co.*

Nor can the trial court's failure to enter a finding on willfulness be reconciled with Washington cases holding willfulness is a question of fact. *See Trotzer v. Vig*, 149 Wn. App. 594, 610, 203 P. 3d 1056, *review denied*,

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[1]

166 Wash.2d 1023, 217 P.3d 336 (2009); *Sherrel v. Selfors*, 73 Wn. App. 596, 604, 871 P. 2d 168, *review denied*, 125 Wash.2d 1002, 886 P.2d 1134 (1994); *Henrickson v. Lyons*, 33 Wn. App. 123, 652 P. 2d 18 (1982); *Blake v. Grant*, 65 Wn. 2d 412; *Gibson v. Thisius*, 16 Wn. 2d 693, 134 P. 2d 713 (1943).

Here, because there is no finding of willfulness, the trial court's award of treble damages against defendants must be reversed. *Trotzer v. Vig*, 149 Wn. App. 610.

None of the authorities cited by Plaintiffs excused the trial court's failure to enter a finding of willfulness in a timber trespass case. Plaintiffs therefore misplace reliance upon *Smith v. Shiflett,* 66 Wn. 2d 462, 467, 403 P. 3d 364 (1965), *Grays Harbor County v. Bay City Lumber Co.,* 47 Wn. 2d 879, 289 P. 2d 975 (1955), *Jongeward v. BNSF R. Co.,* 174 Wn. 2d 586, 594, 278 P.3d 157 (2012), *Hill v. Cox*, 110 Wn. App. 394, 406, 41 P. 3d 495 (2002), and *Seattle-First National Bank v. Brommers*, 89 Wn. 2d 190, 197-98, 570 P. 2d 1035 (1977).[2]

Equally misplaced is Plaintiffs' reliance upon *Maier v. Giske*, 154 Wn. App. 6, 223 P. 3d 1265 (2010).[3] In *Maier v. Giske*, the plaintiffs went beyond cutting overhanging vegetation and cut the trunks of shore pines located on the defendants' property. Here, in contrast, Defendants cut

[2] Respondents' Brief, p. 9.
[3] Respondents' Brief, p. 10-11.

only vegetation overhanging their property. Defendants had a lawful right to do so. *Mustoe v. Ma*, 193 Wn. App. 161, 371 P. 3d 544 (2016); *Gostina v. Ryland*, 116 Wash. 228, 233, 199 P. 298 (1921).

Plaintiffs attempt to distinguish *Mustoe* and *Gostina* on the ground the right of self-help removal of overhanging vegetation only applies when the trunk of the offending tree is on a neighbor's property, but not when the trunk of the tree straddles the property line of the neighbor.[4] In such a case, the tree is common property. *Happy Bunch, LLC v. Grandview North*, 142 Wn. App. 81, 93, 173 P. 3d 959 (2007). Thus, according to Plaintiffs, a property owner has fewer rights if he owns a part of a tree on the property line than if vegetation on a neighbor's tree overhangs the property line. The law does not support such an illogical position.

Happy Bunch does not support Plaintiffs' position. In *Happy Bunch*, the defendant ordered the trees on the parties' property line cut down, whereas here, Defendants did not cut down the tree. Instead, Plaintiffs exercised their time-honored right to remove overhanging vegetation. In *Happy Bunch*, the defendant did not cross-appeal the trial court's judgment, and therefore could not challenge the judgment against defendant for timber trespass. Here, in contrast, Plaintiffs timely filed a notice of appeal of the trial court's judgment.

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[4] Respondents' Brief, p. 12-13.

Moreover, in *Happy Bunch*, the plaintiff did not strip the vegetation on its half of the tree. Here, in contrast, Plaintiffs denuded their half of the tree. While they may not have killed the tree, Plaintiffs unquestionably destabilized it. Plaintiffs' tree expert, Mr. Nuttall, acknowledged that his actions left the tree unbalanced. "*She's a little heavy on the one side there; that's for sure.*"[5] Defendants' tree expert, Timothy Jones, agreed, "*And I couldn't believe it. It was the most ridiculous thing I ever seen. If it was a danger, all I know is I wouldn't-- where his house in in proximity of this tree, I wouldn't have my family sleeping in there.*"[6] Defendant Jose Pelayo recognized the half-denuded tree posed a danger to his family. "*I was surprised and I was afraid because I felt that this tree represented a danger to my house or maybe myself or my wife, anybody in my family.*[7] Thus, the facts of this case are markedly different from the facts in *Happy Bunch.*

Mustoe rejects any duty of care for the tree on the part of a property owner who exercises self-help cutting of overhanging vegetation. 193 Wn. App. 168 (*Quoting Alvarez c. Katz*, 124 A. 3d 839, 843 (Vt. 2015)). Therefore, Defendants owed no duty of care to the tree or to Plaintiffs when they removed the remaining branches for their side of the

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[5] RP 2/20/16, p. 81, l. 9-14; EX 13A, 13B.
[6] RP 2/20/16, p. 89 l. 21-24.
[7] RP 2/10/16 p. 59 l. 7-9.

tree. Under *Mustoe* and *Gostina*, Defendants acted with lawful authority in removing vegetation from their side of the tree.

Plaintiffs misplace reliance upon *In re Kennedy*, 80 Wn. 2d 222, 231, 492 P. 2d 1364 (1972) and *Swanson v. May*, 40 Wn. App. 148, 697 P. 2d 1013 (1985).[8] Neither *Kennedy* nor *Swanson* involved the absence of a finding of willfulness in a timber trespass case. Therefore, neither *Kennedy* nor *Swanson* are controlling here.

In light of the foregoing, Finding 12[9] and Conclusion 1[10] must be reversed.

B. The trial court erred in finding and concluding there were no mitigating circumstances.

Plaintiffs fail to address key language in RCW 64.12.040: "*If upon trial of such action it shall appear that... the defendant had probable cause to believe that the land on which such trespass was committed was his or her own,... judgment shall only be given for single damages.*" It is undisputed that Defendants cut the tree branches while they stood on their property.[11] Therefore, Defendants had probable cause to believe the land where such actions were taken was their own. Under RCW 64.12.040, any judgment rendered against Defendants should have been for single

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[8] Respondents' Brief, p. 8.
[9] CP 102; App. 1.
[10] CP 103; App. 1.
[11] VRP 2/10/16, p. 61 l. 16-p. 62 l. 6; p. 63 l. 10-15.

damages only. Finding 13[12] and Conclusion 2[13] must therefore be reversed.

C. The trial court erred in awarding damages to Plaintiffs.

Because Plaintiffs failed to establish the elements of willfulness and lack of lawful authority on their claim under RCW 64.12.030, and because mitigating factors exist under RCW 64.12.040, it follows that the court had no authority to award damages of any amount against Defendants, let alone treble damages. Defendants incorporate herein the arguments and authorities in Paragraphs A-B, above. Conclusions 3, 6, and 7[14], and paragraphs 1 and 2 of the Judgment[15] must therefore be reversed.

D. The trial court erred in awarding attorney fees to plaintiffs.

Plaintiffs concede the trial court erred in awarding them attorney fees and costs.[16] Finding of Fact 18,[17] Conclusion of Law 6,[18] paragraphs 1 and 2 of the Judgment,[19] and the Judgment Summary[20] must therefore be reversed. *Haaze v. McConnachie*, 1 Wn. App. 388, 390, 461 P. 2d 572 (1969); *Hanley v. Most*, 9 Wn. 2d 429, 451, 115 P. 2d 933 (1941).

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[12] CP 102; App. 1.
[13] CP 103; App. 1.
[14] CP 103-04: App. 1.
[15] CP 105-06; App. 1.
[16] Respondents' Brief, p. 16.
[17] CP 103; App. 1.
[18] CP 104; App. 1.
[19] CP 105-06; App. 2.
[20] CP 99-100.

IV. CONCLUSION

The trial court's findings, conclusions and judgment challenged above must be reversed for the reasons set forth above.

Respectfully submitted,

OF COUNSEL, Inc., P.S.

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V. CERTIFICATE OF MAILING

The undersigned does hereby declare that on October 19, 2016, he delivered a copy of APPELLANTS' REPLY BRIEF filed in the above-entitled case to the following persons:

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DATED this 19th day of October, 2016.

By:
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